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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 509

P. LORILLARD COMPANY,
Petitioner,

against

FEDERAL TRADE COMMISSION,
Respondent.

GENERAL FOODS CORPORATION,
Petitioner,

against

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit (Kalodner and Staley, Circuit Judges; Steel, District Judge, dissenting), entered June 4, 1959 affirming cease and desist orders of the Federal Trade Commission.

Citations to Opinions Below

The initial decisions of the Hearing Examiner of the Federal Trade Commission are unreported and are printed at PL 97a-113a; GF 125a-141a.* The decisions of the Federal Trade Commission, adopting, without opinion, the Hearing Examiner's initial decisions as its own are unreported and are printed at PL 114a-115a; GF 142a-143a. The opinion in the Court of Appeals and the dissenting opinion of Judge Steel, reported at 267 F. 2d 439 (3d Cir. 1959), are printed in Appendix A hereto (*infra*, p. A-1).

Jurisdiction

The opinion of the Court of Appeals was filed and judgment entered on June 4, 1959 (Appendix A, Appendix B, pp. A-1, B-1, B-2). A petition for rehearing, duly filed by petitioners, was denied on August 4, 1959 (Appendix B, p. B-3). A final decree was entered by the Court of Appeals on September 14, 1959 (Appendix B, pp. B-4–B-5).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. These cases present questions of the construction and application of Section 2(d) of the Clayton Act, and specifically of the words "pay or contract for the payment * * * to or for the benefit of a customer", not heretofore passed upon by any court.

* "PL" references are to the Appendix to the Brief of Petitioner P. Lorillard Company in the court below. "GF" references are to the Appendix to the Brief of Petitioner General Foods Corporation in the court below.

A broadcasting company, acting wholly independently of petitioner, and solely to promote its own sales of broadcast time, negotiated for and acquired, for a valuable consideration, rights to have displays of products thereafter to be designated conducted in certain chain grocery stores. The broadcasting company thereafter solicited grocery product manufacturers to buy broadcast time, offering to provide one or more of such product displays at no added cost to purchasers of specified amounts of time over the company's stations. Petitioner subsequently purchased broadcast time at regular commercial rates, none of such time being used by petitioner to advertise any customer. Thereafter petitioner received some of the cost-free product displays which had been offered by the broadcasting company in soliciting purchases of broadcast time. The question presented is:

Whether petitioner's payments to the broadcasting company for such broadcast time constituted discriminatory payments by petitioner "to or for the benefit of" the chain grocers from whom the broadcasting company had acquired display rights, and whether such payments were made "as compensation or in consideration for" services or facilities furnished by any such grocer, within the meaning of Section 2(d) of the Clayton Act.

2. The second question presented is: Whether, where stipulated facts comprise the entire record before the Federal Trade Commission and it based its decisions on findings of fact unsupported by and contrary to the facts stipulated, the Court of Appeals can affirm the decisions by applying to the facts as stipulated an interpretation of Section 2(d) of the Clayton Act not adopted by the Federal Trade Commission.

Statute Involved

The statutory provision directly involved is Section 2(d) of the Clayton Act, 38 STAT. 730, 15 U.S.C. § 13, as amended by the Robinson-Patman Act, 49 STAT. 1526-1527, 15 U.S.C. § 13:

> "(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Statement of the Case

The facts were stipulated.

A broadcasting company* contracted with a number of chain grocers to acquire from them the right to have the chain stores conduct a stated number of floor displays or "in store promotions" of then unnamed products; the broadcasting company was to designate in the future any products it wanted to have "promoted" (PL 11a-12a; GF 16a-17a). Each grocery chain, under its contract, re-

* The case is stated in terms of one petitioner and one broadcasting company to avoid confusion. It was stipulated that three broadcasting companies made such contracts with chain stores (PL 10a-11a; GF 15a-16a), each company acting for itself (See *e. g.*, PL 15a-18a, 28a-33a; GF 20a-23a, 33a-38a).

ceived only broadcast time for its own use from the broadcasting company and the broadcasting company received only the chain's undertaking to conduct the stipulated in-store promotions when the broadcasting company requested them (PL 15a-39a; GF 20a-57a).

When these contracts were made, petitioner was not in any way involved; there was no prior understanding of any sort between petitioner and either the broadcasting company or any of the chain stores with which the broadcasting company dealt (PL 12a; GF 17a). The broadcasting company, finding radio time difficult to sell, acquired the in-store promotion rights on its own initiative in order to get something to offer manufacturers as an inducement to buy broadcast time (PL 11a-12a; GF 16a-17a).

Thereafter, the broadcasting company solicited manufacturers of products sold in groceries to purchase broadcast time and offered them, at no extra cost, the chance to have their products designated for in-store promotions, provided they bought certain amounts of broadcast time (PL 11a-12a; GF 16a-17a). Petitioner bought broadcast time well in excess of such amounts (PL 12a-13a, 74a-75a, 94a-95a; GF 17a-19a, 108a-110a, 122a-123a). This time was bought at the regular station card rates paid by all commercial advertisers whether they sold grocery products or not, whether they received in-store promotions or not (PL 13a; GF 19a). The time was used exclusively to advertise petitioner's own products, without mention or showing of any customer's name or store (PL 13a; GF 18a-19a). Petitioner thereafter received some promotions in chain stores, though not the number allocable to its time purchases (PL 74a-75a, 94a-95a; GF 108a-110a, 122a-123a).

Petitioner's time purchase contracts did not entitle it to exact the promotions from either the broadcasting company or the chain stores (PL 60a-73a; GF 92a-107a). Petitioner P. Lorillard Company, for example, was denied

certain promotions by chain stores in Chicago (PL 85a, 92a, 95a). The broadcasting company offered only such promotions as it already had on hand when it sold time to petitioner; it did not offer to obtain promotion rights additional to those it already had (PL 12a, 101a; GF 17a, 129a). The chain stores which did display petitioner's products received nothing for setting up such displays that they would not have received under their preexisting contracts with the broadcasting company even if they had not been called upon to display petitioner's products or even if petitioner had not bought any broadcast time (PL 13a; GF 18a).

The Federal Trade Commission commenced proceedings against each petitioner under Section 11 of the Clayton Act (15 U.S.C. § 21) charging that petitioner had violated Section 2(d) of the Clayton Act (PL 2a-6a; GF 2a-7a). On the wholly stipulated facts (PL 10a; GF 15a), the Federal Trade Commission, adopting the entire initial decision of its Hearing Examiner (PL 114a-115a; GF 142a-143a), assumed that petitioner "made the only money payment involved in the whole transaction" and was in consequence "the sole financial support of the plan" and therefore "paid for the broadcasting time granted the chain store for in-store promotional displays, as well as for the broadcasting time purchased for . . . [petitioner's] own use." (PL 107a; GF 135a). On this ground the Commission concluded that petitioner had, by its payment to the broadcasting company for broadcast time, paid or contracted to pay something of value not only for its own benefit but also for the benefit of the chain stores in consideration for in-store promotions furnished to petitioner by the chain stores, without making the same or similar benefits available on proportionally equal terms to all of petitioner's competing customers, and that these acts and practices constituted a violation of Section 2(d) of the Clayton Act (PL 104a-113a; GF 132a-141a). In reaching this result, the Commission concluded without support, or any claim of support, in the record

that the "omission" from petitioner's time purchase contracts with the broadcasting company of "the benefit intended to be conferred, in the form of broadcasting time, upon the chain store" appeared "to be, palpably, an attempt to circumvent" the Clayton Act (PL 110a; GF 138a) and that the "in-store promotion feature . . . was actually the primary cause and the chief consideration for the execution of" the time purchase contracts (PL 106a; GF 134a-135a).

Petitioner invoked the jurisdiction of the court below under Section 11 of the Clayton Act, 15 U.S.C. § 21, by petition for review duly filed (PL 1a, 116a-119a; GF 1a, 144a-148a). The Court of Appeals interpreted Section 2(d) as forbidding any payment made by a seller to *any* person whether or not intended by the seller to benefit a customer and whether or not the seller has reason to know that some direct benefit to a customer will proximately result from it, if, despite the absence of relevant motive or intention, the consequence of the payment is that something "of benefit" to a customer eventuates. (Appendix A, pp. A-8 to A-9). The Court affirmed, one judge dissenting, finding "benefit" in the theory that in some sense petitioner paid the broadcasting company for the promotions and that the Commission "could well find . . . that the broadcasting company's grant of time to the chain stores was part of the total transaction for which petitioners paid." The Court rested its decision on the ground that it had to accept the Commission's conclusion that petitioner's payments to the broadcasting company inured to the benefit both of petitioner and of the chains as a consideration for the promotions accorded petitioner's products (Appendix A, pp. A-9–A-10).

Reasons for Granting the Writ

I.

The court below has rendered a decision of fundamental significance in the application of an important Act of Congress (*Cf. Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 58 (1959)). This Court has explained that Section 2(d) of the Clayton Act "prohibits the payment by a seller to a customer for any services or facilities furnished by the latter, unless 'such payment . . . is available on proportionally equal terms to all other [competing] customers.'" *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U. S. 55, 65 (1959). The decision below interprets the statute as extending far beyond its plain meaning, as thus recently stated by this Court, and would apply it where there is neither a payment by the seller to a customer nor a payment *for* services or facilities furnished by such customer. This the court below would achieve by fundamentally redefining the conception of "payment" as used in the statute and by radically diluting, if not wholly eliminating, the statutory requirement of a distinct bargaining of consideration for a customer service.

The statute deals only with "payments" made "to or for the benefit" of a customer. Inquiry ends if there is no "payment" in the statutory sense; inquiry is not revived merely because a customer service has been furnished. It is "payment" that Section 2(d) regulates and not the receipt of customer services.

The decision below introduces a novel interpretation of the "payments" with which the statute deals, an interpretation that metamorphoses the meaning and application of Section 2(d). It holds that a seller's payment made not to his customer but to a *third person* for regular media

advertising bought from him at going commercial rates is a payment made "for the benefit of" the seller's *customer*, and therefore within the statute, even though the "benefit" the payment confers on the customer is the same and only the same indirect and generalized "benefit" that all other cash receipts of the third person can be said to confer on anyone to whom the third person renders services or delivers goods under contract, or from whom he procures them.* Applied in the present case, this has meant that petitioner's payments at going commercial rates to the broadcasting company for broadcast time, although indistinguishable in their "benefit" to the chain stores from any other revenue payments made to

* No court case in the 23 years since Section 2(d) was enacted has involved a payment made by a supplier to a third party as distinguished from a payment to a customer. Every judicial summary of the sense of Section 2(d) has expressed it in essentially the terms used by this Court in the *Supplicity Pattern* case, that is, as a Section dealing with payments by a seller to a customer for a service or facility furnished by the customer. See *Oliver Bros. v. Federal Trade Commission*, 102 F. 2d 763, 767 (4th Cir. 1939); *Shaw's Inc. v. Wilson-Jones Co.*, 105 F. 2d 331, 333 (3d Cir. 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 677 (3d Cir. 1939) (quoting the language from the *Oliver Bros.* case, *supra*); *Southgate Beverage Co. v. Federal Trade Commission*, 150 F. 2d 607, 611 (4th Cir. 1945); *Ludwig v. American Greetings Corporation*, 264 F. 2d 286, 288 (6th Cir. 1959); *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626, 649 (E. D. Ill. 1946); *Russellville Canning Co. v. American Can Co.*, 87 F. Supp. 484, 499 (W. D. Ark., Ft. Sm. Div., 1949), reversed 191 F. 2d 38 (8th Cir. 1951); *Bayson v. Jessop Steel Co.*, 90 F. Supp. 303, 305-306 (W. D. Pa. 1950) (quoting at p. 306, the *Southgate* case, *supra*); *United Cigar Whelan Stores Corp. v. H. Weinreich Co.*, 107 F. Supp. 89, 91 (S. D. N. Y. 1952); *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, 474 (N. D. Ill., E. D. 1957), modified 258 F. 2d 831 (7th Cir. 1958), *cert. denied* 358 U. S. 947 (1959). Cf., cases in which the Court epitomizes complaints ignoring the "benefit" language: *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F. 2d 988 (8th Cir. 1945); *Federal Trade Commission v. Minneapolis*, 145 F. Supp. 164, 165 (D. Md. 1956), affirmed 242 F. 2d 81 (4th Cir. 1957), *cert. denied* 353 U. S. 957 (1957); *Baum & Blank Inc. v. Phelps Corporation*, 148 F. Supp. 541, 542 (E. D. N. Y. 1957).

the broadcasting company by the other users of its facilities, are nevertheless payments made by the seller "for the benefit of" the chain stores. The court below has dispensed with any requirement that the payment be directly or measurably beneficial to the customer, or *result* in ascertainable benefit to the customer, or be made with that intention. This appears to be the meaning of the court's statement that the real question was "whether the petitioners have made payments *to someone* which actually are *of benefit* to their customers"* without regard to the remoteness of the "benefit" or its incidental nature.

The court below has further held that a payment is made "as compensation or in consideration for" a service furnished by a customer where there was no bargain for the service, no direct dealing for it with the customer and no legal right to demand it. The customer-service involved was used as a sales-inducing premium by a third person interested in selling his own services at their regular going rate. No definable, identifiable amount was paid as "consideration" or "compensation" for the customer-services even if they were bargained for. It was enough—in the court's view—that in a limited and negative sense it could be said that they had not been given away "free" by the broadcasting company.** The concise contractual language of the statute requiring a payment that has been made "as compensation or consideration" for a customer service was loosely read to bring within its scope something not contractually bargained for, the

* Italics added; Appendix A, pp. A-7–A-8.

** The court below relied on *Herbert v. The Shanley Company*, 242 U. S. 591 (1917), which holds that playing a copyrighted song in a restaurant is a public performance of it for profit. The ground of decision was that the statute did not need to be narrowly construed as distinguishing between performances of music as such to which money admission was charged and performances in a restaurant the purpose of which was profit and which were paid for by the public as part of the total though not itemized on the bill.

receipt of which could not be enforced, and which was not proportioned to petitioner's purchases of broadcast time.

The court below has thus dissolved two of the three basal elements in the statute, (1) the "payment" element and (2) the requirement that there be a bargain of a payment for a service. It has so attenuated the statutory requirement as to each element as to give the statute a meaning at wide variance from its plain intention and from this Court's summary of its sense in the *Simplicity Patterns* case. Indeed, since petitioner was neither entitled to receive nor bound to use the in-store promotions, not even the time of violation of the statute would be ascertainable under the interpretation imposed on the statute by the court below. Even under the theory adopted by the Commission, no violation could in any event occur unless and *until* petitioners received in-store promotions and then, surely, only if they were used with a conscious design to take advantage of the inducement, perhaps long before offered. The elements of statutory violation in these circumstances, payment to or for a customer in consideration for a service furnished by the customer, are impossible to locate.

The Commission and the court below have categorically stated that in deciding whether a seller's payment to a third person is a payment "for the benefit of" a customer within the meaning of this section, the Commission need not "restrict itself" to the contract principles which a court would apply in determining whether a contract was made "for the benefit of" a third party. This raises the question whether the Congress intended the words "for the benefit of" in Section 2(d) to be construed in accordance with the recognized principles of contract law that the statute seems clearly to invoke. If not, then what criteria can a seller apply in judging whether a payment made for goods or services may be regarded as "benefiting" a customer so as to require pro-

portionalization to competing customers? As pointed out by Judge Steel, dissenting, the seller's only safe course would be to refuse to buy from any supplier who was then employing the services of, or supplying, a customer of the seller. Surely no such radical prohibition was contemplated by the framers of this Act.

That this interpretation is alien to the statute's purpose is plain from the fact that the court below treats as a "payment" an amount that cannot be measured or defined. For, no allocable part of petitioner's payments to the broadcasting company can be defined as paid for the customer service; petitioner paid precisely the same rates as all other commercial advertisers whether of grocery products or not, whether they received promotions or not.*

Comparable offers of in-store promotional rights as purchase incentives are and long have been widespread among other advertising media, including national periodi-

* The purpose of the statute is not to discourage but to secure the proportionalization of the payments. See S. R. No. 1502, 74th Cong., 2d Sess., pp. 7-8:

> "Section 2 (c) ultimately, as amended, Section 2 (d) of the bill addresses this evil by prohibiting the granting of such allowances unless made available to all other customers of the seller concerned on proportionately equal terms, or unless in the rendition of such services the customer's own business is kept out of the picture. The first of these conditions is designed to rob this practice generally of its discriminatory character, and the second to leave open a legitimate field for the use of customer services as mere employees or agents in local advertising, in lieu of salaried representatives sent in from without, or of other local personnel strangers to the seller's acquaintance. The frequency with which limited advertising appropriations admit of their expenditure only in selected communities makes it important both to the seller and to the local community to preserve this freedom so long as it is properly protected against discriminatory use."

peals.* The countless advertisers who have innocently availed themselves of these services, the innumerable stores that have provided promotions, are exposed to the risk of myriad treble damage actions by the Third Circuit Court's doctrinal expansion of the scope of Section 2(d).

The problem presented by these cases is comparable in importance to those presented by *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953), in which this Court resolved the complex problems arising under Section 2(f) of the Clayton Act respecting conscious inducement and receipt of price discriminations, and the *Simplicity Pattern* case at the last term, in which this Court determined the availability under Section 2(c) of the Clayton Act of the defense of cost justification as well as the role, under Section 2(c), of effect on competition. (*Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 65-67, 70-71 (1959)). The recent amendment to Section 11 of the Clayton Act,** making cease and desist orders based on Section 2 self-enforcing, without the necessity for confirmation by the Court of Appeals after proof of violation (*Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952)), and attaching heavy civil penalties to violation, increases the

* The tremendous extent of the innocent, widely publicized use by the broadcasting industry of the sales method criticized by the court below appears from the fact that a nationally known advertising firm has published "A List of Radio and Television Stations Which Offer In-Store Display Space to Their Advertisers" (1959-1960 edition, copyright July 1959) (Batten, Barton, Durstine & Osborne Marketing Department). The list is 279 pages long.

Trade publications show the widespread offering of marketing services by advertising media as a means of stimulating space sales. See, *e. g.*, "Magazines' Merchandising Services Offer Advertisers New Aids in Marketing", *Printers' Ink*, September 26, 1958, p. 90; "See What Mags Can Offer", Sales Meetings Part II, Sales Management, July 17, 1959, p. 435.

** Public Law No. 86-107 of July 23, 1959.

rigor of the Act, particularly in view of the usually broadly worded and uninformative cease and desist orders that the Federal Trade Commission enters, and has entered in this case. The consequent severity of operation of Section 2(d) in those instances in which it does apply, and the increasing intensity of the Federal Trade Commission's attentions to Section 2(d),* make all-important an early determination of the correctness of the decision of the court below with its far-reaching effect on the scope of Section 2(d). The difficulty of interpreting Section 2, arising both from the tortuousness of its language and its debatable relation to the general policy of the anti-trust laws, has been noted by this Court before (*e.g.*, *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 65, 73-74 (1953); *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 248-250 (1951)) and will be before the Court (but under a different subsection of the Act) during the present term (*Henry Broch and Company* v. *Federal Trade Commission*, 261 F. 2d 725 (7th Cir. 1958), certiorari granted 360 U.S. 908 (1959) (Case No. 61)).

*The Chairman of the Federal Trade Commission, Earl W. Kintner, in an address given September 9, 1959, before the Advertising Club of Washington and the Audit Bureau of Circulations (Advertising Age, September 14, 1959, pages 1, 186), stated that the Federal Trade Commission had issued 109 complaints under Section 2(d) since 1936 and that 73 of such complaints had been issued in the past six years. He further stated that the Commission was currently investigating 68 cases of alleged violation of Section 2(d), 27 of which involved food products. In the six fiscal years ending June 30, 1958 the Commission issued 278 "anti-monopoly" complaints; 73 complaints under Section 2(d) would be over 25% of the anti-monopoly complaints of a six-year period. See Annual Reports of the Federal Trade Commission, 1958, p. 32; 1957, pp. 31-32, 37; 1956, p. 28; 1955, p. 33; 1954, p. 28; 1953, pp. 11, 19. That there has been increased emphasis on enforcement of Sections 2(d) and 2(e) in recent years, see the explicit statement of the Federal Trade Commission in its Annual Report for the fiscal year ended June 30, 1956 (p. 33). The present complaints were issued just after the end of the fiscal year ended June 30, 1956.

II.

The decision in the court below conflicts in principle with that of the Court of Appeals for the Seventh Circuit in *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (1959)* interpreting Section 2(c) of the Clayton Act.

Section 2(d), forbidding discriminatory payments to or for the benefit of customers in consideration of services or facilities furnished by customers, parallels Section 2(c), forbidding the discriminatory furnishing, or contributing to the furnishing, of services or facilities to customers.

The Seventh Circuit, in the *State Wholesale Grocers* case, in passing on the Section 2(c) issue, while assuming that the A&P magazine "Woman's Day", displayed and sold only in the A&P stores, was a "service" or "facility" and that the magazine as such was a promotional operation of A&P, held that the purchase of advertising in the magazine at the regular commercial rates did not constitute either furnishing or contributing to the furnishing of the magazine to A&P as a sales service or facility, because the advertising revenues of the magazine "furnished" the magazine to the A&P only in the unreal and derivate sense of keeping it going, a function performed indifferently by all receipts and all economies of the magazine.

In a parallel situation under Section 2(d), the court below has incompatibly found that the purchase of advertising time from the broadcasting company at the regular

* Certiorari denied *sub nom: General Foods Corporation* v. *State Wholesale Grocers*, 358 U. S. 947 (1959).

commercial rates for petitioner's own exclusive use did constitute the furnishing of broadcast time to the chains through the broadcasting stations.

While the court below stated, without analysis, that the facts were different from those in the *State Wholesale Grocers* case, it appears to have recognized that its own conclusion was incompatible with the Seventh Circuit decision for the opinion below impliedly criticized the Seventh Circuit decision by stating that it had failed to cite or distinguish cases of which *Herbert* v. *The Shanley Company*, 242 U. S. 591 (1917), is typical. The latter case, however, holding that a musical performance given in a restaurant is a performance for profit under copyright law even though not separately charged for on the customer's bill, goes only to the question whether the petitioner received the in-store promotions from the broadcasting companies "free"; it does not go to the point at issue, that is, whether the payment to the broadcasting company is a payment "to or for the benefit of" the chain stores. The *Herbert* case neither states nor implies that the diner's payment of his check was a payment for the benefit of the musicians or the composer.

III.

By affirming the decision of the Federal Trade Commission, the court below departed from the accepted and usual course of judicial proceedings which, under this Court's decisions in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80 (1943) and 332 U.S. 194 (1947), requires that courts reviewing administrative action must judge it solely by the grounds invoked by the agency and may not affirm by substituting what the reviewing court considers a more adequate or proper base.

All the facts were stipulated and the stipulation was not merely binding (*Hackett & Co. v. United States*, 197 U.S. 442 (1905)), but favored by the law (*Burstein v. United States*, 232 F. 2d 19, 23 (8th Cir. 1956)). The Federal Trade Commission's decision was nevertheless based on impermissible factual inferences that the stipulated contracts constituted a consciously planned subterfuge designed to circumvent the inhibitions of Section 2(d) of the Clayton Act (PL 106a, 110a; GF 134a-135a, 138a), and that the obtaining of in-store promotions from the customers was the primary cause and the chief consideration for the execution by petitioner of its contracts to purchase broadcast time from the broadcasting company (PL 106a; GF 134a-135a).* No such facts were stipulated and the stipulation of the contracts involved, coupled with the stipulation that the broadcasting company's contracts with the chains were made without any prior understanding with petitioner (PL 12a; GF 17a), required the exactly contrary inference of good faith. Indeed, it was not stipulated that petitioner knew anything about the relation between the broadcasting company and the chains nor that petitioner was in fact influenced in its purchases of broadcast time by either the offer or the receipt of the promotions. The stipulations of fact which, with the pleadings, constituted the entire evidentiary record in the case, thus forbade the findings that were evidently dispositive of the case in the Commission's view (PL 10a-14a; GF 15a-19a).

The Court of Appeals, affirming, paid lip service to the Commission's administrative role, but it very carefully

* The Commission in substance treated the case as being the same as such cases as *Matter of Atlantic City Wholesale Drug Co., et al.*, 38 F. T. C. 631 (1944), dealing with what were found to be subterfuges, in the particular case, a magazine put out by a purchaser in which his suppliers were required to buy advertisements that were devoid of advertising value.

did not, and it could not without manifest error, adopt the unsupported "subterfuge" findings of the Commission. The opinion of the court below affirmatively discloses that it adopted an interpretation of the statute that dispensed with motive and intention and that treated objective result and consequence as controlling. The court rejected the Commission's insistence on the significance of motive and intention and its consequent reliance, for a finding of violation, on the erroneous inference that the "total transaction" was a subterfuge consciously devised to defeat the application of Section 2(d). Since the Commission had not viewed the statute as did the court below nor decided the case on the facts in the record, the court below in substance affirmed an administrative determination of law and fact that had never been made. In so doing it erroneously sought to supply indispensable but missing administrative action in place of that actually taken by the Commission. *Cf. Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 745-746, 764-765 (1947); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705-706, 726-727 (1948); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54-55; also (dissent) 58 (1948); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; also (dissent) 490-492 (1952); *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 396-397; also (dissent) 398-401 (1953).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court

(Filed June 4, 1959)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,665

P. LORILLARD COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 12,709

GENERAL FOODS CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL TRADE COMMISSION

Argued Feb. [illegible], 19[illegible]

Before KALODNER and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

By STALEY, *Circuit Judge*.

We are asked by these petitions pursuant to Section 11 of the Clayton Act, 38 Stat. 734, 15 U.S.C. § 21, to review and set aside two substantially identical cease and desist orders issued by the Federal Trade Commission. The orders to be reviewed were issued by the Commission against General Foods Corporation and P. Lorillard Company,[1] the petitioners, at the conclusion of proceedings upon complaints which charged them with violations of Section 2(d) of the Clayton Act, as amended.[2] These proceedings were had before the hearing examiner upon stipulated records with annexed exhibits. The initial decisions of the hearing examiner, which include cease and desist orders, were adopted by the Commission without further opinion.[3]

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[1] Additional and similar complaints had been filed against the following companies: Groveton Papers Company, FTC Docket 6592, (order issued May 7, 1958); Pepsi-Cola Company, FTC Docket 6593 (dismissed on other grounds); Coca-Cola Bottling Company of New York, FTC Docket 6594 (dismissed on other grounds); Sunkist Growers, Inc., FTC Docket 6595 (consent order issued); Sunshine Biscuits, Inc., FTC Docket 6597 (order issued May 7, 1958); Piel Bros., Inc., FTC Docket 6598 (order issued May 7, 1958); Hudson Pulp & Paper Corp., FTC Docket 6599 (order issued May 7, 1958).

[2] "(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities." 49 Stat. 1526, 15 U.S.C. § 13.

[3] These cases involve common questions of law and fact. Inasmuch as they were briefed and argued together, we see no necessity for separate opinions.

The complaints charged the petitioners with having made payments to certain broadcasting companies[4] for the benefit of chain-store customers of petitioners, thus providing broadcasting time "to the favored customers for said customers' own advertising purposes." The payments thus effected were alleged to have been made as compensation or in consideration for services or facilities furnished by these favored customers in connection with the offering for sale and the sale of petitioners' products. Further, it is averred that the benefits so conferred on some of petitioners' customers were not made available on proportionately equal terms to petitioners' other customers, in violation of Section 2(d) of the Clayton Act, as amended.

The stipulated facts may be summarized as follows: In 1950 and 1951 the sale of broadcasting time had become difficult, and the broadcasting companies each developed promotional schemes to enable them to sell time to manufacturers and sellers of grocery products. Although the companies devised their plans independently, they are substantially similar in content, providing for in-store promotions as an inducement to purchase radio and television time. The broadcasting companies negotiated contracts with certain grocery chains whereby they covenanted to provide the chains with specified amounts of radio or television time each week during the term of the contracts. The contracts provided that the broadcasting time would be used by the chains only for their own advertising. In exchange therefor the chain stores agreed to conduct a specified number of week-long promotional displays in their stores of products sold therein. The products and dates were not specified in the contracts but rather it was provided that they were to be agreed upon by the parties, the broadcasting companies proffering suggestions, subject to the right of the chains to decline to promote products not

[4] The "broadcasting companies" referred to were the American Broadcasting Company (ABC), National Broadcasting Company, Inc. (NBC), and Columbia Broadcasting System, Inc. (CBS), the latter having submitted a brief in this court as amicus curiae.

deemed by them to be suitable for promotion in their stores. These contracts were made without any prior commitment or agreement involving anyone other than the grocery chains and the broadcasting companies. Following negotiation of this series of contracts, the broadcasting companies solicited petitioners and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in store promotions of petitioners' products in the chain stores under contract. These promotional plans were variously named "Supermarketing," "Chain Lightning," "Mass Merchandising," and "Sell A Vision" and were promoted by means of brochures and circulars stating the details of the offers. The leaflets indicated that purchasers of a minimum amount of radio or television time would be provided, at no extra cost, with a specific number of in-store promotions of their products. The broadcasting companies stated in their brochures that they were able to offer the displays as a result of the firm contractual commitments which they had previously negotiated with specified chain stores. The circulars also emphasized the size of the chains under contract, their annual volume, and the percentage of the retail market that they controlled.

Petitioners entered into contracts for the purchase of broadcasting time, and, although the contracts contained no mention of the in-store promotions and specifically negatived any agreement other than that contained in the written contract,[3] they received the benefits of the plans

[3] The following clause appears in both the ABC and CBS contracts:

"This contract contains the entire agreement between the parties and is not subject to oral modification."

The NBC clause reads as follows:

"This contract constitutes the entire agreement between the parties relating to the subject matter hereof and may not be changed, modified, renewed or extended except by an agreement in writing signed by the party against whom enforcement of the change, modification, renewal or extension is sought."

as specifically set forth in the brochures. In fact, in many instances, after notification of the proposed date of a promotion, petitioners contacted the designated chain store for the purpose of arranging the details of the in-store promotional displays. Without exception, those of petitioners' customers who received radio or television advertising time, pursuant to the contracts described herein, were grocery chains in competition in the resale of petitioners' products with other grocery chains and independent customers of petitioners in the same market areas. The latter customers did not receive nor were they offered broadcasting time or anything of value in lieu thereof.

Petitioners deny that they paid anything to or contracted with the broadcasting companies "for the benefit of" a customer within the meaning of Section 2(d) of the Clayton Act. Further, they deny having paid for or supported the furnishing of broadcasting time to the chains and, lastly, deny having adopted or having become a party to the broadcasting companies' sales promotions. It is readily apparent that the arguments overlap and that their determination depends largely upon the Commission's interpretation of Section 2(d) and the stipulated facts.

It is appropriate to keep in mind that administrative interpretations of statutes by agencies charged by Congress with their execution are recognized as having peculiar persuasiveness and weight. National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111 (1944); American Airlines, Inc. v. Civil Aeronautics Board, 178 F. 2d 963 (C.A. 7, 1949); Miller Hatcheries, Inc. v. Boyle, 131 F. 2d 283 (C.A. 8, 1942). As we recently stated in St. Marys Sewer Pipe Co. v. Director of the U.S. Bureau of Mines, 262 F. 2d 378, 381 (C.A. 3, 1959), "Ordinarily, such constructions should be accepted by the courts unless they could not be reasonably or soundly made under the terms of the statute." The agency's interpretation, however, must be consistent with the purposes of the statute for

Justice Frankfurter states in the recent case of United States v. Shirey, — U.S. — (decided April 20, 1959),

> "Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' United States v. Whitridge, 197 U.S. 135, 143. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words. See United States v. Wurzbach, 280 U.S. 396, 399. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see United States v. Johnson, 221 U.S. 488, 496, or, as Judge Learned Hand has somewhere put it, the art of interpretation is 'the proliferation of purpose.'"

The purpose of the section here involved was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods. This is made clear by the statement of Congressman Utterback, chairman of the House conferees, in explaining Sections 2(d) and (e), as follows:

> "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which

> the same purpose might be accomplished, and it prohibits payment for such services or facilities, whether furnished 'in connection with the processing, handling, sale, or offering for sale' of the products concerned." 80 Cong. Rec. 9418.

Petitioners' argument when analyzed and stripped to its essentials is basically a plea for reliance upon technical rules of contract law. It asserts, in effect, that since it was not a party to the contracts between the broadcasting companies and the chain stores and that since they preceded its contracts with the broadcasting companies, there is nothing illegal or violative of Section 2(d) in the transactions. On the other hand the Commission refuses to wear blinders and insists that the series of contracts be viewed as a whole. Substance is lent to the Commission's analysis by the presence in this case of a number of brochures or circulars which were utilized by the broadcasting companies. Although it is true that the petitioners' contracts with the broadcasting companies contained no mention of the in-store promotions, they were prominently mentioned in the brochures. These promotions were not only held out as inducements for the purchase of broadcasting time by the petitioners, but were sought and utilized by them.

The petitioners' position is bottomed on the assumption that in deciding whether a violation of the statute has occurred the Commission must restrict itself to an assessment of the consequences which flow from a written contract by the application of formal principles which a court would be required to apply in an action between the contracting parties. If, however, we keep in focus the real question involved, that is, whether the petitioners have made payments to someone which actually are of benefit to their customers and not whether they have bound themselves to do so by a legally enforceable contract, it is

readily apparent that petitioners' position is untenable. Certainly, the legal effect of the contracts involved may be relevant to the resolution of the real issue before the Commission, but it does not follow that the Commission must give to those contracts the effect for which the parties to them contend nor that it cannot view them in the setting of all the other evidence relevant to the issue before the Commission.

Petitioners contend here as they did before the Commission that they did not pay or contract to pay to any third person anything of value for the benefit of a customer. In support of this position, petitioners assert that a payment to or contract with a third person is not made for the benefit of a customer within the meaning of Section 2(d) unless the seller makes it with the intention of benefiting the customer or has reason to know that some direct benefit to the customer will proximately result therefrom. No authority for the former proposition is cited, and in fact it conflicts with the statement of counsel for the petitioners, Cyrus Austin, in his monograph entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, wherein it is stated at page 116:

> "It is no defense for a seller charged with a violation of either of these sections [2(d) and 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination."

In accord, State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co., 258 F. 2d 831, 837 (C.A. 7, 1958), cert.

denied, sub nom. General Foods Corp. v. State Wholesale Grocers, 358 U.S. 947 (1959). This section of the Act does not concern itself with motive or intention. It is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden. The Commission, however, went further than required and found that "the responsible officials of Respondent [petitioners] knew, or should have known, when they entered into the plan presented to Respondent by the broadcasting company, that Respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors." This finding is amply supported by the record.

A substantial portion of petitioners' argument is directed to refuting the Commission's finding that they were the "sole financial support" of the promotional plan. Reliance is placed upon one case—State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co., 154 F. Supp. 471 (N.D. Ill. 1957), affirmed in part and reversed in part, 258 F. 2d 831 (C.A. 7, 1958), cert. denied sub nom. General Foods Corp. v. State Wholesale Grocers, 358 U.S. 947 (1959). In that case A&P and three grocery product manufacturers were charged with violation of Sections 2(d) and 2(e) by purchasing substantial advertising in *Woman's Day* magazine, a wholly-owned subsidiary of A&P. The court of appeals affirmed the dismissal of the 2(e) charge but found that the payments for advertising of defendants' products in *Woman's Day* violated Section 2(d). The rationale underlying the dismissal in that case is founded on the conclusion that the payments for advertising could not be held to represent a furnishing of a service to A&P. In addition to the obvious factual differences between the two cases, it is worthy of note that the court failed to cite or distinguish the line of cases begin-

ning with Herbert v. The Shanley Co., 242 U.S. 591 (1917), where Justice Holmes held that a single payment may indeed cover the cost of more than one object. Also see Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (W.D. Pa., 1938); M. Witmark & Sons v. L. Bamberger & Co., 291 Fed. 776 (D.C. N.J., 1923). The broadcasting companies are not eleemosynary institutions and the Commission could well find from the record that the grant of "free" broadcasting time[6] to the chain stores was part of the total transaction for which the petitioners paid. The fact that the charge for the whole transaction was attributed to a particular item, to wit, petitioners' advertising time, is not determinative. The Commission's conclusion that the payments made by the petitioners to the broadcasting companies inured to the benefit not only of petitioners, but also of the favored chains as compensation or in consideration for the in-store promotions afforded petitioners' products has warrant in the record and a reasonable basis in the law, and this court must accept it. National Labor Relations Board v. Hearst Publications, 322 U.S. 111 (1944).

Petitioners' last objection relates to the "sweeping" nature of the cease and desist orders issued by the Commission. Clearly, the orders in the instant cases go no further than that issued against the Ruberoid Company and specifically approved by the Supreme Court in Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952). Also see Moog Industries v. Federal Trade Commission, 355 U.S. 411 (1958), affirming Moog Industries v. Federal Trade Commission, 238 F. 2d 43 (C.A. 8, 1956). The fact that these cases involved orders issued in the language of Section 2(a) of the amended Clayton Act should give us little pause, for Section 2(d) is much narrower in scope

[6] We agree with petitioners' counsel that "nothing here turns upon the fact that the consideration which the broadcasting companies gave to the chains in return for in-store promotions was in broadcast time rather than in money."

and therefore orders framed in its language would be well within the permissible ambit of the Commission's discretion.

The orders of the Commission will be affirmed.

STEEL, *D. J.*, dissenting:

Had petitioner[1] paid for the broadcasting time of the chains, either directly by payments to the chains, or indirectly by payments to the broadcasting companies independently of the purchase by petitioner of its own broadcast time, the payments clearly would have been for the "benefit" of the chains within the meaning of § 2(d). The petitioner did not do either of these things. But the Commission and a majority of the court hold that an identical significance must be attributed to the payments which petitioner made to the broadcasting companies in purchasing air time for itself.

A violation of § 2(d) of the Clayton Act entails, among other things, the following elements: (1) a discriminatory payment by a vendor for the benefit of a customer, (2) in consideration for services or facilities furnished by the customer to the vendor in connection with the sale of a commodity of the vendor. Without both elements of benefit there can be no § 2(d) violation. The finding of the Commission that the in-store promotions offered by the broadcasting companies induced petitioner to enter into its contracts with the broadcasting companies implies that petitioner anticipated the receipt of a benefit by way of in-store promotions. This finding relates solely to the second element of a § 2(d) offense. The present point of inquiry is directed to the existence of the first element of a § 2(d) violation, viz., whether petitioner made a payment for the benefit of the chains.

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[1] General Foods will be treated as if it were the sole petitioner, for unless otherwise indicated the petitioner Lorillard stands in no different position

In determining whether the petitioner's payments to the broadcasting companies were for the "benefit" of the chains within the meaning of 2(d), it is easy to become bogged down in a semantic morass. The word "benefit" has various meanings depending upon the context of its use. In a sense, every dollar which the broadcasting companies took into their coffers during the time when air time was being granted to the chains was for the benefit of the chains regardless of the source of the income. Revenue was the life blood of the broadcasting companies upon which their very existence depended and without which the chains would have had no air media over which to advertise. The Clayton Act, of course, is not concerned with this type of benefit. It is aimed at discriminatory advantages which a vendor by virtue of his own conduct confers upon a vendee, or, under certain sections of the Act, reciprocal advantages which a vendor and vendee confer upon each other by virtue of their own respective acts. Whether petitioner's payments to the broadcasting companies were for the benefit of the chains must be gauged from this standpoint.

The contracts between the broadcasting companies and the chains under which the chains received air time antedated the contracts between the broadcasting companies and petitioner. The execution of the agreements by petitioner was not a contingency upon which the right of the chains to air time depended. That right had theretofore accrued; it was fixed, immediate and unqualified. Nothing was required of petitioner or anyone else to bring into fruition the right of the chains to air time save the performance by the broadcasting companies of their contracts with the chains. Petitioner was in no way responsible for this. So that on the face of the matter, the advertising which the chains become entitled to receive, the moment they put pen to paper with the broadcasting companies was not the result of any payment by petitioner.

The Commission and a majority of the Court assert, however, that the separate elements of the sales promotional plan initiated by the broadcasting companies, i.e., the two sets of contracts, the brochures of solicitation, and the designation of products for in-store promotions, cannot properly be given fragmentary evaluation, but that each must be treated as an integral part of the whole. This approach would be understandable if the broadcasting companies were defendants and their activities were charged to be violative of the law. The broadcasting companies stand at the hub of the transaction. It was their correlating activities which gave to the plan whatever cohesiveness and interdependence was inherent in it. It was their efforts which were responsible for obtaining the in-store sales promotional rights from the chains. It was they who chose the chains from which petitioner might make its selection for in-store promotions. All this was done by the broadcasting companies without any prior commitment, authorization, agreement, or understanding with petitioner. This is a stipulated fact. So that no basis exists for the Commission's finding that the broadcasting companies occupied an "agency" relationship to petitioner through which petitioner in effect channeled payments to the chains in the modified form of broadcasting time.

The conclusion of the Commission that the actions of petitioner were of discriminatory benefit to the chains within § 2(d) intentment is not aided by theorizing that the broadcasting companies would not have renewed their contracts with the chains unless the sales promotion plan had been sufficiently supported by the totality of suppliers, including petitioner, who purchased broadcast time.[2] This

[2] The Commission "assumed" that without the support of *other* petitioner the plan of the broadcasting companies would have been unprofitable and of short duration. This assumption is based upon the Commission's finding that *each* petitioner provided the "sole" financial support of the plan. This finding is unsupported by any

approach makes petitioner's violation of the Act depend not only upon the contemporaneous actions of other suppliers but also upon the subsequent actions of the broadcasting companies in renewing their contracts with the chains when, so far as the record reveals, neither the suppliers nor the broadcasting companies were subject to control by petitioner. Whatever benefit the chains may have derived from this combination of events, is from petitioner's standpoint, too vicarious and causally remote to enmesh petitioner in the Act.

In the light of the peripheral relationship which petitioner bore to the plan, the statement of the Commission that petitioner became a "party" to and "adopted" the plan is meaningless. All petitioner did was to accept what the broadcasting companies offered. Yet, under the Commission's concept of "benefit", petitioner would be culpable under the Clayton Act even if it had not designated any of its products for promotion by the chains. For under the Commission's view, it was petitioner's payments to the broadcasting companies which constituted payment for the air time allotted to the chains. The amount of petitioner's payments did not depend upon whether it designated products for in-store promotions. Petitioner's payments were the same in either case. The failure of petitioner to designate products for in-store displays would have exculpated petitioner from liability under § 2(d), for the furnishing of services or facilities by a customer is a *sine qua non* to a § 2(d) violation.[3] How-

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evidence and is untenable on its face." Actually, the plan was availed of by eight other companies in addition to petitioner. (Fn 1, Opinion of the Court.) "ABC sold an aggregate of advertising under its plan of $2,473,514.39, of which General Foods bought $157,211.01; CBS sold $1,057,470.03, of which General Foods bought $182,497.12; and NBC sold $1,247,468, of which General Foods bought $81,520."

[3] If the mere right to designate products for in-store promotions as distinct from the actual designation is deemed to be a service or facility furnished by the chains to petitioner then under the

ever, without the designation of products for in-store promotion, petitioner's payments to the broadcasting companies, under the Commission's reasoning, would clearly have rendered petitioner liable under § 2(c)[4] for furnishing advertising discriminately to the chains, and under § 2(a)[5] for indirect price discrimination in favor of the chains if the effect had been monopolistic or destructive of competition. For unlike § 2(d) which is aimed at reciprocal vendor-vendee benefits, §§ 2(a) and 2(c) are directed solely against unilateral discriminations by a vendor.

If the Commission's conception of "benefit" is adhered to, the only way in which the petitioner could have escaped the toils of the Clayton Act during the period when

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Commission's interpretation of the Act, the failure of petitioner to designate products would not have exonerated petitioner from a § 2(d) violation.

[4] Section 2(c) of the Clayton Act, 15 *U.S.C.* § 13(c), reads:

"(c) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

[5] Section 2(a) of the Clayton Act, 15 *U.S.C.* § 13 a reads in part:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; * * *"

the broadcasting companies were offering in-store promotions would have been either to forego completely advertising over the air through the broadcasting companies offering the promotions, or to buy air time for all of petitioner's customers on a basis proportionately equal to that on which the broadcasting companies had allotted air time to the chains. Petitioner would have found itself in this unhappy plight solely because of the contracts which the broadcasting companies made with the chains for which the petitioner was in no way responsible.

Carried to its logical limit, the decision of the Commission means that if a common supplier of a vendor and vendee, without pre-arrangement with the vendor, grants the vendee terms more favorable than the supplier has granted other customers of the vendor, the vendor must stop dealing with the supplier, give proportionately equal "benefits" to all of its other customers, or be adjudged guilty of Clayton Act discrimination. This result would follow regardless of how vital the commodities or services furnished by the supplier might be to the vendor. A construction of 2(d) which carries within itself the seeds of consequences so harsh, unreasonable and oppressive should not be reached unless required by a clear Congressional mandate. This I am unable to discern.

The foregoing views are not at variance with the cases which the majority of the Court has cited. *Herbert v. Shanley Co.*, 242 U.S. 591 (1917), and *M. Witmark & Sons v. L. Bamberger & Co.*, 291 Fed. 776 (D.N.J. 1923) involved constructions of the Copyright Act. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) was concerned with principles of unfair competition and the Communication Act of 1934 in their relationship to interference with a contractual right to broadcast baseball games. These decisions are scarcely pertinent to a determination whether petitioner's payments to the broadcasting companies were a "benefit" to

the chains within the purview of the Clayton Act. To the extent that *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7th Cir. 1958) may have application, it tends to refute rather than to support the decision of the Commission.

It may be that the sales promotional plan of the broadcasting companies is economically undesirable and that the broadcasting companies which sponsored it are beyond the reach of the present law. But this is no reason for making a whipping boy out of petitioner by affirming the far-fetched conception of Clayton Act "benefit" which the Commission has adopted.

Judicial responsibility requires that a Court which sits in review of an administrative order shall interpret the applicable statute and hold unlawful and set aside any agency action not in accordance with law, 5 *U.S.C.* § 1009 (e). In the fulfillment of that responsibility, I would set aside the order of the Commission in each case and direct a dismissal of the complaints.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment in P. Lorillard Company Case

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,665

P. LORILLARD COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Present: KALODNER and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

This cause came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Trade Commission in this case be, and it is hereby affirmed.

June 4, 1959 ATTEST: IDA O. CRESKOFF, Clerk

Received & filed

Jun 4, 1959

IDA O. CRESKOFF, Clerk

Judgment in General Foods Case

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,709

GENERAL FOODS CORPORATION,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Present: KALODNER and STALEY, *Circuit Judges*, and SAUL, *District Judge*.

This cause came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Trade Commission in this case be, and it is hereby affirmed.

June 4, 1959

ATTEST: IDA O. CELESKOFF

Received & filed

Jun 4, 1959

IDA O. CELESKOFF, Clerk

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 12,665 and 12,709

P. Lorillard Company,

Petitioner,

v.

Federal Trade Commission,

Respondent.

General Foods Corporation,

Petitioner,

v.

Federal Trade Commission,

Respondents.

Present: Kalodner and Staley, *Circuit Judges*, and Sell, *District Judge*.

After due consideration the petition for rehearing in the above entitled cases is hereby denied.

By the Court

Staley
Circuit Judge

Dated:
August 4, 1959

Received & filed
Aug. 24, 1959

Ira O. Cleveland, Clerk

Final Decree Affirming Orders to Cease and Desist

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,709

GENERAL FOODS CORPORATION,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

No. 12,665

P. LORILLARD COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Present: KALODNER and STALEY, *Circuit Judges*, and STEEL, *District Judge*.

Petitioners herein, having filed in this Court on July 25, 1958, and on September 18, 1958, respectively, petitions to review and set aside two orders to cease and desist issued against them on May 7, 1958, by the Federal Trade Commission, respondent herein, in two substantially identical proceedings before it; and a copy of each petition having been served and respondent having thereafter certified and filed herein, as required by the Clayton

Act, a transcript of the record of each proceeding; and the Court having entered on October 13, 1958, an order consolidating the above-entitled two causes for the purpose of oral argument; and the matter having been heard by this Court on February 6, 1959, and this Court having thereafter fully considered the two causes and having rendered its decision on June 4, 1959;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by this Court that the aforesaid two petitions to review be, and they are hereby, denied, that the orders of the Federal Trade Commission entered in the above-entitled two causes be, and they are hereby, affirmed.

By the Court

STALEY
Circuit Judge

September 14, 1959

Received & filed
Sep 14 1959
IDA O. CRESKOFF, Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 2 1959
JAMES R. BROWNING, Clerk

No. 509

In the Supreme Court of the United States

OCTOBER TERM, 1959

P. LORILLARD COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

J. LEE RANKIN,
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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals and the dissenting opinion of Judge Steel (Pet. A-1—A-17) are reported in 267 F. 2d 439. The initial decisions of the hearing examiner and the decisions of the Federal Trade Commission adopting these initial decisions (PL 97a-115a; GF 125a-143a)[1] are not yet reported.

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[1] "PL" references are to the Appendix to the brief of petitioner Lorillard Company in the court below. "GF" references are to the Appendix to the brief of petitioner General Foods Corporation in the court below.

JURISDICTION

The judgments of the court of appeals were entered on June 4, 1959, rehearing was denied on August 4, 1959, and a "final decree" in the two cases was entered on September 14, 1959 (Pet. B-1—B-5). The petition for a writ of certiorari was filed on November 2, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A broadcasting company entered into agreements with certain chain grocery stores which provided that it would furnish to the contracting chain a specified amount of broadcasting time for the latter's own advertising, and that the chain would conduct a specified number of promotional displays in its stores, with the broadcasting company later designating the products so to be displayed. Subsequently the broadcasting company solicited petitioners (and other manufacturers and sellers of grocery products) to purchase radio or television time and, as an inducement, offered in-store promotions of petitioners' products in the chain stores under contract. Petitioners' chain store customers who thus obtained advertising time competed in the resale of its products with other customers of petitioner who were not given any like opportunity to obtain broadcasting time in exchange for furnishing promotional displays. On these facts, the principal question presented is:

Whether petitioners paid anything of value "for the benefit of" certain chain store customers "as compensation or in consideration for" promotional

services furnished by these customers, within the meaning of §2(d) of the Clayton Act.[2]

STATUTE INVOLVED

Section 2(d) of the Clayton Act, 15 U.S.C. 13(d), provides:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

STATEMENT

The complaints issued by the Federal Trade Commission in these cases charged that petitioners, manufacturers and sellers of products sold in grocery stores, had violated §2(d) of the Clayton Act by making payments to certain broadcasting companies for the benefit of chain-store customers of petitioners. Since the pertinent facts as to each petitioner, including the contracts made by the three broadcast-

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[2] A further question presented by the petition (discussed *infra*, p. 12) is whether the court below based its decision upon a ground not considered and determined by the Commission.

ing companies involved, are substantially identical, for clarity we shall deal with the facts in terms of one petitioner and one broadcasting company. The cases were heard on fact stipulations (PL 10a-14a; GF 15a-19a), which embraced numerous attached exhibits, and the facts are not disputed.

Contracts made by a broadcasting company with a number of chain grocery stores provided the chains with broadcasting time for their own advertising in exchange for their agreement to conduct a specified number of week-long promotional displays of products which they sold (PL 11a; GF 16a). The contracts did not specify the products to be promoted, but provided that the broadcasting company might later designate these products subject to the right of the chain to decline to promote any product which it deemed not suitable for promotion in its stores (PL 100a; GF 128a).

Thereafter the broadcasting company solicited petitioner, a manufacturer and seller of products distributed through grocery stores, to purchase radio or television time and offered it, as an inducement for such purchase, in-store promotion of its products in the chain stores under contract (PL 11a-12a; GF 16a-17a). The promotional plan was communicated to prospective customers by means of brochures and circulars extolling the benefits of coordinated advertising in the home and in the store and setting forth the details of the offer (PL 100a-102a; GF 128a-130a). The leaflets indicated that, as a result of firm contractual commitments which the broadcasting company had previously negotiated with spec-

ified chain stores, purchasers of not less than a stated minimum amount of radio or television time would be provided, at no extra cost, with a specific number of in-store promotions of their products (Pet. A-4; PL 46a; GF 66a, 86a). The circulars also emphasized the size of the chains under contract, their annual sales volume, and the percentage of the retail market which they controlled (Pet A-4; PL 56a; GF 74a).

Petitioner's contracts for the purchase of broadcasting time did not mention the in-store promotions, but the promotional services, as set forth in the brochures, were rendered (Pet. A-4—A-5; PL 13a; GF 18a) and the contracts for broadcasting time were frequently renewed.[3] In many instances, after notification of the proposed date of a promotion, petitioner contacted the designated chain store for the purpose of arranging the details of the in-store promotional displays (PL 13a; GF 18a).

The few chain store customers of petitioner who received broadcasting time pursuant to their contracts with the broadcasting company were in competition with numerous other chain stores and a great many independent grocers, all customers of

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[3] The typical contract was of one year's duration, subject to right of termination at the end of 12 or 13 weeks (see GF 22a; PL 17a). Payments made by petitioner Lorillard between October 1953 and June 1956 to ABC and CBS under their respective plans amounted to about $412,286 (PL 74a-75a) and those made by petitioner General Foods under arrangements with ABC, CBS and NBC between August 1952 and June 1956 were approximately $421,228 (GF 108a-110a).

petitioner in the same market areas (PL 14a; GF 19a). However, these latter customers did not receive, nor were they offered, broadcasting time or anything of value in lieu thereof (*ibid*).

The hearing examiner found that, in determining whether §2(d) had been violated, the contracts between the broadcasting company and the chain stores and between petitioner and the broadcasting company were so interrelated that they must be viewed as integral parts of an overall plan, and that petitioner's payments to the broadcasting company for the purchase of broadcasting time were, in part, payment of something of value "for the benefit of" certain customers of petitioner "as compensation or in consideration for" services which they furnished to petitioner in connection with retail sale of petitioner's products (PL 106a-111a, GF 134a-139a). Since such payment or consideration was admittedly not "available on proportionally equal terms" to all other customers of petitioner competing with the favored customers in the sale of petitioner's products, the examiner concluded that petitioner's conduct clearly violated §2(d) of the Clayton Act (PL 112a-113a, GF 140a-141a).

The Commission adopted the examiner's initial decision as its own, and issued a cease-and-desist order (PL 114a, 113a; GF 142a, 141a).

The court below, in affirming the Commission's order, stated (Pet. A-10):

> The Commission's conclusion that the payments made by the petitioners to the broadcasting companies inured to the benefit not only of peti-

tioners, but also of the favored chains as compensation or in consideration for the in-store promotions afforded petitioners' products has warrant in the record and a reasonable basis in the law, and this court must accept it.

ARGUMENT

1. Unlike *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, cited by petitioners in support of the appropriateness of review here, this case presents no issue of "fundamental significance" in the application of §2 of the Clayton Act (see *id.* at 58). Rather, the issue which is presented is whether the Commission properly applied §2(d) of the Clayton Act to the particular factual situation here involved.

That section makes it unlawful for any seller to pay anything of value "to or for the benefit of a customer * * * in consideration for any services or facilities furnished by or through such customer" in connection with resale of the seller's goods, unless such payments are proportionally available to other customers competing in the distribution of its goods. Obviously the section would be violated if a seller of goods agreed with a customer that it would purchase from a broadcasting company broadcasting time for use by the customer in advertising its name and offerings, in exchange for special promotional displays of the seller's product in the customer's stores. The only difference between that situation and the present one is that here the transaction involved two steps, nominally independent: first, a contract between the customer and the broadcasting

company and, second, a contract between the seller and the broadcasting company. But the second step was premised on, and necessarily involved adoption by the seller of, the first step, or at least the facts warranted the Commission in so finding. The agreement between petitioner and the broadcasting company was the instrumentality through which the objective was attained; and it was, therefore, an integral part and a vital link in effectuating the entire advertising plan.

Section 2(d) is broadly framed and prohibits not only payment "to" a customer but also payment "for the benefit of" a customer. As the court below stated, the purpose of the section was "to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods" (Pet. A-6). The court said that this was made clear by the following statement in explanation of §§2(d) and 2(e), which are correlative, by Congressman Utterback, chairman of the House conferees (80 Cong. Rec. 9418):

> * * * The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. *The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the*

same purpose might be accomplished * * *. [Emphasis supplied.]

The promotional scheme in which petitioners participated clearly resulted in discrimination of the type Congress intended to eliminate. The court below said that petitioners' contention "stripped to its essentials is basically a plea for reliance upon technical rules of contract law", upon the assumption that the question of statutory violation is to be assessed by the application of "formal principles" governing actions based on written contracts (Pet. A-7). The court, in rejecting this test, correctly held, we submit, that the "real question" was whether petitioners had made payments "of benefit" to certain customers under circumstances falling within the §2(d) prohibition, and, this being the case, it was immaterial that petitioners had not "bound themselves to do so by a legally enforceable contract" (*ibid.*). What this Court has said as to the Sherman Act is equally pertinent here, namely, that the question of violation of the Act "must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of" the statutory prohibition. *United States* v. *Masonite Corp.*, 316 U.S. 265, 280.

There is ample support in the record for the Commission's finding that the contracts between the broadcasting company and the chain stores and between petitioners and the broadcasting company were integral, interrelated parts of an overall plan whereby petitioners (and other similarly situated sellers)

acquired for a money consideration the right to promotional services furnished by certain of their chain store customers. The broadcasting company's brochures made it crystal clear that petitioners were paying for two things—broadcasting time for their own use and broadcasting time for certain chain store customers; and that for such payment they were obtaining two things—broadcasting time for their own use and promotional displays of their goods in stores of certain chain store customers. Since there was thus a payment for advertising broadcast time obtained by chain store customers, it is immaterial that the broadcasting company may have initiated the plan or arrangement without prior agreement with petitioners. As the examiner said, each petitioner, by accepting the broadcasting company's sales-promotion plan, "became a party thereto, and cannot now evade full responsibility therefor" (PL 110a-111a, GF 139a).

We submit that petitioners' contention (Pet. 9) that their payments to the broadcasting company conferred upon their chain store customers "only the same indirect and generalized 'benefit' that all other cash receipts of the [broadcasting company] can be said to confer on anyone to whom the [broadcasting company] renders services" incorrectly characterizes the facts. The broadcasting company is operated for profit, and the broadcasting time given without charge to certain chain stores was not a gift, but was in return for something of value received from them, namely, the right to have certain products given promotional displays in their stores. When it passed on

this right to petitioners, in a package proposal for purchase of broadcasting time plus this right of display, that part of petitioners' payments made in order to obtain this right was a payment to the contracting store (through the broadcasting company) for display services furnished by it to petitioners.

We dispute petitioners' contention (Pet. 15) that the decision below "conflicts in principle" with *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (C.A. 7), certiorari denied *sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947. In that case certain companies which sold goods to the A & P grocery chain and which advertised in *Woman's Day*, a magazine published by A & P and sold in its stores for a nominal price, were charged with violating §2(e) of the Clayton Act, which prohibits a seller from contributing to the furnishing of any services or facilities connected with a purchaser's resale of the seller's goods, upon terms not accorded to all purchasers on proportionally equal terms. All advertisements in the magazine were handled by an independent advertising agency and were sold and purchased at rates comparable to those charged by magazines of like national circulation; all purchasers of advertising paid the same rates; and companies not selling goods to A & P contributed more than one-third of the magazine's total advertising revenue. On these facts, the court, in dismissing the §2(e) charge, held that the defendants were not contributing to the furnishing of the magazine any more than a railroad passenger could be said to contribute, by the payment of

his fare, to the furnishing of the railroad's services. We submit that, on these totally dissimilar facts, the cited decision is not even remotely in conflict with the decision in the instant case. Although petitioners argue (Pet. 15) that the purchase of advertising in Woman's Day was a "parallel situation" to the "purchase of advertising time from the broadcasting company," the Commission's finding of violation here rested on far more than petitioners' mere purchase of broadcasting time.

2. Petitioners seem to contend (Pet. 17-18) that the decision below is erroneous because based upon a ground other than that adopted by the Commission. The basis of the contention apparently is that the opinion of the court below does not refer to a statement made by the examiner, in the course of his 17-page initial decisions, that "the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between [petitioner] and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract" (PL 106a, GF 134a-135a). But the examiner's decisions (adopted by the Commission), read in their entirety, and particularly as expounded in the "Conclusion" (PL 111a-113a, GF 140a-141a), make it clear that the ruling was not, as petitioners contend (Pet. 18), grounded on petitioners' "motive and intention", but was grounded, like the decision of the court below, on the basic undisputed facts of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1959.

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